

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TRACY WRIGHT,

Defendant-Appellant.

UNPUBLISHED

December 28, 2001

No. 222171

Wayne Circuit Court

LC No. 98-006163

Before: Cavanagh, P.J., and Doctoroff and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, and felony-firearm, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to life imprisonment for his second-degree murder conviction, and to the mandatory two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant first argues that the trial court abused its discretion by allowing the prosecution's main witness to testify that he was shot after testifying at the preliminary examination. We disagree. According to the witness, defendant's brother attempted to shoot the witness approximately one to two weeks after he gave testimony at defendant's preliminary examination. A short time later, the witness was shot in the chest and stomach, but could not identify the person that shot him.

We review evidentiary issues for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

We must first address whether the witness' testimony was relevant under MRE 401 because only relevant evidence is admissible. MRE 402; *People v Campbell*, 236 Mich App 490, 503; 601 NW2d 114 (1999). Relevant evidence is evidence having *any tendency* to make the existence of any fact of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401; *Campbell, supra* at 503. Relevant evidence must be material to a fact of consequence, but materiality does not mean that the evidence must be directed at an element of a crime or an applicable defense. *People v Sabin (After Remand)*, 463

Mich 43, 57; 614 NW2d 888 (2000). Instead, a material fact is a fact “in issue,” i.e., a fact that is “within the range of litigated matters in controversy.” *Id.*, quoting *People v Mills*, 450 Mich 61, 68; 537 NW2d 909, modified 450 Mich 1212 (1995).

At trial, defendant asserted that the witness was the shooter; thereby implying that the witness’ testimony was not credible because it was self-serving. To rebut defendant’s assertion and to strengthen the witness’ credibility, the prosecution was permitted to introduce the witness’ testimony that defendant’s brother attempted to shoot him and that someone shot at the witness later, but he could not identify the second shooter. The jury could reasonably infer that the second shooter was defendant’s brother. The witness’ credibility was crucial to the determination of defendant’s guilt, and this testimony tended to assist the jury in weighing his credibility. We conclude that the testimony was relevant because the witness’ credibility was a material fact of consequence at trial and his testimony was the sole evidence establishing defendant as the shooter. *Mills, supra* at 72; MRE 401.

Having determined that the testimony was relevant under MRE 401, we next address whether the evidence should have been excluded under MRE 403. There is no doubt that the witness’ testimony prejudiced defendant to some extent; however, all evidence offered by the prosecution is prejudicial. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). It is only when the probative value of the evidence is “substantially outweighed” by the danger of unfair prejudice that the evidence must be excluded. *Id.* at 336-337; MRE 403.

Here, we cannot conclude that the danger of unfair prejudice substantially outweighed the probative value of the testimony. The jury could have considered the testimony and found that the witness was shot because he was the prosecution’s key witness and testified against defendant at the preliminary examination. However, the jury could have also considered the testimony and concluded that the witness was shot because he allegedly lied or “set up” the defendant to avoid prosecution in this case. The trial court does not abuse its discretion when it rules on close evidentiary matters. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

Defendant next argues that the prosecution denied him a fair trial by appealing to the jury’s sympathy and vouching for its key witness’ credibility. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Reversal is warranted only where plain error results in a conviction of an actually innocent person or when the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Schutte, supra* at 720; *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

Allegations of prosecutorial misconduct are reviewed case by case to determine whether a defendant has been deprived of a fair and impartial trial. *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998). To determine whether a prosecutor has committed misconduct, we review the relevant portions of the record and consider the prosecutor’s remarks in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). In this case, we conclude that no prosecutorial misconduct occurred and that any prejudice that might have occurred could have been eliminated by a curative instruction had defendant made a timely objection at trial. *Id.*; *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant next argues that he was denied effective assistance of counsel because his attorney failed to request a voluntary manslaughter instruction. We disagree. Whether defendant was denied the effective assistance of counsel is a constitutional question, which this Court reviews de novo. *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999); *People v Pennington*, 240 Mich App 188, 191; 610 NW2d 608 (2000).

To establish a claim for ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient under an objective standard of reasonableness and that there is a reasonable probability that, but for the deficiency, the outcome would have been different. *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). An attorney is presumed to provide effective assistance of counsel, and a defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

The elements of voluntary manslaughter are: (1) the defendant killed in the heat of passion, (2) the passion was caused by an adequate provocation, and (3) there was no lapse of time during which a reasonable person could have controlled his passions. MCL 750.321; *People v Sullivan*, 231 Mich App 510, 518; 586 NW2d 578 (1998). The element of provocation distinguishes manslaughter from murder. *Sullivan*, *supra* at 518. Further, the provocation necessary to mitigate a homicide from murder to manslaughter is that which would cause the defendant to act out of passion rather than reason. *Id.* Provocation is adequate only if it is so severe or extreme that it would provoke a reasonable person to lose control. *Id.*

Here, the evidence did not support a voluntary manslaughter instruction. There was absolutely no evidence supporting a finding that defendant acted with provocation, let alone reasonable provocation. An attorney does not render ineffective assistance of counsel by failing to raise a meritless position. *Snider*, *supra* at 425.

Defendant next argues that the evidence was insufficient to convict defendant of second-degree murder.¹ We review issues regarding sufficiency of the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found all the necessary elements of the offense beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268; 380 NW2d 11 (1985).

The elements of second-degree murder are: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse. MCL 750.317; *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001). "Malice" is the (1) intent to kill, (2) intent to cause great bodily harm, or (3) intent to do an act in wanton and willful disregard of the likelihood that the natural tendency of the behavior is to cause death or great bodily harm. *Id.* Malice may be inferred from the facts and circumstances surrounding the case. *People v Spearman*, 195 Mich App 434, 438; 491 NW2d 606 (1992), rev on other grounds *People v*

¹ Defendant also asserts that there was insufficient evidence for first-degree murder. However, we decline to address this question because defendant was not convicted of first-degree murder. If defendant is raising that question in an attempt to challenge the information against him, that issue is waived because defendant did not move to quash the first-degree murder charge before trial. *People v Hoffman*, 205 Mich App 1, 23; 518 NW2d 817 (1994).

Velting, 443 Mich 23, 42-43; 504 NW2d 456 (1993). Further, it is the province of the jury to determine questions of fact and to assess the witness' credibility. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

It is undisputed that the victim died of a gunshot wound after he yelled "what's up" to defendant and some of defendant's friends. Testimony produced at trial established that defendant retrieved an AK47 rifle from a nearby vehicle, aimed it at the victim's vehicle, and fired several shots at the vehicle as the victim drove away. It was reasonable to infer that defendant either intended to kill the victim or intended to inflict great bodily harm on the victim when firing the rifle directly at the victim's occupied vehicle. No reasonable provocation or mitigating circumstances existed. Viewing the evidence in a light most favorable to the prosecution, the evidence sufficiently proved beyond a reasonable doubt that defendant committed second-degree murder. *Petrella, supra* at 268.

Defendant next argues that his life sentence is cruel and unusual. We disagree. We review sentences imposed on habitual offenders for an abuse of discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997).

Under the principle of proportionality, a defendant's sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the specific offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Sentencing guidelines do not apply to habitual offenders, *Hansford, supra* at 323-324, and a trial court does not abuse its discretion by imposing a sentence on an habitual offender that is within the statutory limits when a defendant's underlying felony, and previous felonies, show that he cannot conform his conduct to the law. *Id.* at 326. Further, a proportionate sentence is not cruel or unusual punishment. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

A trial court may impose a life sentence on individuals convicted of second-degree murder. MCL 750.317. Additionally, because defendant was convicted as a fourth habitual offender, being previously "convicted of any combination of 3 or more felonies," he could properly be sentenced to life imprisonment. MCL 769.12(1)(a). We conclude that defendant's sentence is proportionate to the seriousness of the offense and offender.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Kathleen Jansen